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No.

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In The

Supreme Court of the United States

October Term, 1982

RALPH FREDERICK NUNZIATA,

Petitioner,

vs..

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Under the Due Process Clause of the Fifth Amendment, does an accused in a federal felony prosecution have the right to enter a conditional plea of guilty in which the conclusiveness of the plea is conditioned upon the accused's reservation of the right to appeal from an adverse ruling on a pretrial motion to dismiss the indictment for noncompliance with the Speedy Trial Act's timetables for filing of the indictment and the government's readiness for trial?

2. As a matter of due process of law under the Fifth Amendment, once the right or privilege to enter a conditional guilty plea is afforded to the accused, can it be subjected to the requirement of the accused's having to obtain at the time of plea the government's and the court's consent to the entry of such a plea?

3. Under the rule of federal criminal procedure that a voluntarily entered guilty plea waives all prior nonjurisdictional defects in the defendant's prosecution, does an accused who pleads guilty to one count of a multiple-count indictment brought under the National Firearms Act of 1968 charging the accused with the illegal transportation of an unregistered piece of weaponry, to wit, an M-16 lower receiver, waive and withdraw from appellate review the defense that the count fails to charge him with an offense, based on the definition of "firearm" in the Act, or is the substantive insufficiency of the count a nonwaivable jurisdictional defect that can be raised after conviction or on appeal?

4. For purposes of determining the adequacy of legal counsel in a criminal case, under the Fifth Amendment's Due Process Clause's requirement that a plea of guilty must be voluntary and knowingly made and under the Sixth Amendment right of the

accused to the effective assistance of counsel, can a guilty plea to an indictment count be said to be voluntary and intelligently made when the accused's counsel was misinformed as to the applicable timetable and dates of arrest and further prosecution of the accused that may have been controlling on defendant's motion to dismiss under the Speedy Trial Act, and when counsel failed to apprise himself and to advise the accused of the availability of a meritorious defense of the criminal charge's legal insufficiency and further failed to advise the accused of and to take steps to preserve the pleading option of entering a conditional plea of guilty that would have preserved these defenses for further review?

PARTIES TO THE PROCEEDING

The caption of the case in the Supreme Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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No.

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RALPH FREDERICK NUNZIATA,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Ralph Frederick Nunziata, petitioner, by his attorney, Charles A. Giulini, Jr., respectfully shows as follows:

OPINIONS BELOW

The opinions of the district court below were delivered orally from the bench in open court and are spread on the court reporter's minutes but are not otherwise reported. *United States v. Ralph*

Frederick Nunciata, No. 81 Cr. 298 (E.D.N.Y., proceedings of 6/23,/81, 10/5/81).

The memorandum opinion of the circuit court below is not reported in the slip sheets of that court nor in the official reporter. *United States v. Ralph Frederick Nunciata*, No. 81-1357 (2d Cir. April 19, 1982).

JURISDICTION

The date of the judgment sought to be reviewed is April 19, 1982. The time of its entry is also April 19, 1982.

By order dated May 26, 1982, the Honorable Thurgood Marshall, Associate Justice of the Supreme Court, extended petitioner's time to file a petition for writ of certiorari to and including July 19, 1982.

The Supreme Court has jurisdiction to hear the petition by virtue of 28 U.S.C. §1254(1) permitting review by the Supreme Court of cases in the court of appeals by writ of certiorari granted upon the petition of a party to a criminal case after rendition of judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Following are the citations to the constitutional provisions and statutes which the case involves. The provisions cited are set forth verbatim in the appendix: United States Constitution, Amendment V (in part); United States Constitution, Amendment VI (in part); 18 U.S.C. §2; 18 U.S.C. §§921(a)(3), 922(g)(1), 924(a); 18 U.S.C. §§3161(b), 3161(c)(1), 3161(d)(1), 3162(a)(1); 26 U.S.C. §§5841, 5845(a)(6), 5845(b), 5861(j), 5871; Federal Rules of Criminal Procedure 11(c), 11(d), 11(f), 32(d) and 35(b).

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

On May 13, 1981 petitioner Ralph Frederick Nunziata was indicted under a 15-count indictment for multiple violations of Chapter 44, Title 18 of the United States Code, 82 Stat. 234, 18 U.S.C. §§921 *et seq.*, and of the National Firearms Act of 1968, 82 Stat. 1229, 26 U.S.C. §§5841 *et seq.* He pleaded guilty to Count 6 of the indictment. Count 6 charges him with one act of transporting in interstate commerce an "M-16 lower receiver" that had not been registered in the National Firearms Registration and Transfer Record in accordance with the procedures set forth in Section 5841 of the National Firearms Act of 1968, in violation of Section 5861(j) of the Act, 26 U.S.C. §5861(j). The violation carries a maximum sentence of 10 years' imprisonment and a $10,000 fine. *Id.*, §5871. Petitioner, a first-time offender under the Act, was given six years. His conviction and sentence were upheld by the Court of Appeals for the Second Circuit.

Before the filing of the indictment, petitioner had been prosecuted under a criminal complaint, sworn out August 1, 1980 by an enforcement agent of the Alcohol Tobacco and Firearms Bureau of the U.S. Department of the Treasury. The complaint alleges the shipment of the M-16 lower receiver but alleges the violation of a different statute, 18 U.S.C. §922(g)(1) which prohibits the interstate shipment of a firearm, as defined in 18 U.S.C. §921(a)(3), by anyone previously convicted of a crime punishable by a term of imprisonment exceeding one year in duration.[1] That carries a maximum sentence upon conviction of five years' imprisonment and a $5,000 fine. *See* 18 U.S.C. §924(a).

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1. Petitioner at the time of his prosecution had a state felony conviction on his record. *See* N.Y. Penal L. §5510 [subd. 1(b)]. He had received probation.

On August 12, 1980, petitioner was arrested and brought before the United States Magistrate to answer the complaint. He pleaded not guilty, a preliminary hearing was waived and, upon posting of an appearance bond, he was released.

Exactly 37 days later, on September 18, 1980 or seven days after the expiration of the 30-day arrest-to-indictment time limitation for filing of an information or indictment under the Federal Speedy Trial Act, 88 Stat. 2076, 18 U.S.C. §§3161 *et seq.*, 3161(b) (1976), the Magistrate ordered the complaint dismissed, on the motion of the Assistant United States Attorney.

Nine months later, on May 22, 1981, petitioner voluntarily appeared in court with court-appointed counsel to be arraigned under the indictment. Petitioner was not rearrested, refingerprinted or rephotographed. He pleaded not guilty and a trial date of July 1, 1981 was set, with June 5, 1981 as the due date for motions.

By notice of motion dated June 16, 1981, returnable June 26, 1981, petitioner's counsel moved to dismiss the indictment for exceeding the Speedy Trial Act's arrest-to-indictment and indictment-to-trial time limits. He supported this with a two-page affirmation in which he incorrectly gave August 1, 1980 and September 1, 1980 as the dates of petitioner's arrest under the complaint and the dismissal thereof, respectively, which the district court expressly adopted in denying the motion on the basis of satisfaction of the Speedy Trial Act's time limit of 30 days for the filing of an indictment following an arrest. *See* 18 U.S.C. §3161(b).[2]

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2. September 1, 1980 was a Monday and was Labor Day, when the court was closed.

As critically important as the chronology of the case was to the success of the motion, and as all-important as the motion was in constituting petitioner's sole defense to the indicment,[3] petitioner's counsel did not renew the motion after the Assistant United States Attorney sent a letter to the court with copy to counsel the day after the motion was heard, pointing out the correct complaint dismissal date.[4] In fact, in arguing the motion on the basis of August 1/September 1 operative dates, counsel argued against his own position to the effect that the Speedy Trial Act timetable was not exceeded at all, incorrectly stating the law to be that the government had 35 days after petitioner's arrest in which to return an indictment, or four days more than it assertedly took to dismiss the complaint thereby staying within its time limit.

The same day of and after the Speedy Trial Act motion's denial, petitioner, pursuant to a prearranged agreement with the United States Attorney, offered to withdraw his not guilty plea and to plead guilty to Count 6 of the indictment charging the interstate shipment of the "M-16 lower receiver", in satisfaction of all the counts. Tracking the allocution format prescribed by Fed. R. Crim. P. 11, subds. (c), (d) and (f), to determine the voluntariness of the plea, the district court advised petitioner of his constitutional rights to a speedy jury trial, to confrontation and cross examination of witnesses, and of the consequence of his rights' waiver by pleading guilty; read Count 6 and asked petitioner to tell the court in petitioner's own words what he had

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3. Petitioner changed his plea to guilty as soon as the motion was denied.

4. The District Court relied on counsel's failure to immediately renew the Speedy Trial Act motion on the basis of the actual arrest/dismissal dates, in denying the motion again when it was renewed by substituted counsel in the Fed. R. Crim. P. 32(d) motion for post-conviction relief. *See* appendix at 10a, *infra*.

done;[5] asked the government to relate the proof it was prepared to offer and advised petitioner of the maximum sentence that he could receive. Petitioner acknowledged his awareness of his rights, of the charge brought and the consequences of a guilty plea, and proceeded to plead guilty to Count 6. Finding a factual basis for it, the district court accepted the plea and, on September 11, 1980, imposed the sentence of six years' imprisonment.

Petitioner thereafter retained his present counsel who, by motion made returnable on October 5, 1981, sought to withdraw the plea, pursuant to Fed. R. Crim P. 32(d),[6] on the basis of the government's violation of the Speedy Trial Act by reprosecuting petitioner by indictment filed more than 30 days after petitioner's arrest on the same charge contained in Count 6, and on the basis that the shipment alleged in Count 6 did not meet the statutory definition of firearm in consisting of the lower half of a receiver from an M-16 automatic rifle.[7] Relief was denied; however, upon counsel's application in open court the district court did grant petitioner 30 days, until November 4, 1981, in which to file a notice of appeal[8] and also permitted petitioner to remain free on bail which was reimposed. These actions were

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5. In his own words, "What I did, sir, I had in my possession the rear half of a de-militarized M-16 Receiver, or a part of it. I shipped it . . . " *United States v. Ralph Frederick Nunziata*, 81 Cr. 298, Minutes of 6/23/81, p. 9.

6. Fed. R. Crim. P. 32(d) provides that after sentence on a judgment of conviction a defendant may be permitted to withdraw his guilty plea if he can demonstrate to the satisfaction of the court that the failure to do so will result in manifest injustice.

7. *See* 18 U.S.C. §921(a)(3); 26 U.S.C. §5845 [subds. (a) (6), (b)].

8. Under Fed. R. App. P. 4(b), petitioner's time to appeal expired on September 21, 1981 or 10 days from the entry of the judgment of sentence on the criminal docket on September 11, 1981.

taken upon the government's stating that it had no problem and no objection, respectively, with each action.

The appeal was timely brought and perfected. In his brief to the Court of Appeals, petitioner strongly urged in Point I that dismissal of the indictment with prejudice was mandated by the language and purposes of the Speedy Trial Act, given the correct operative dates. He also argued material variance between the shipped article's description in the indictment and what it actually consisted of. By notice of motion made returnable on March 24, 1982, the date set for oral argument of the appeal, the government moved pursuant to Fed. R. App. P. 27(b) to have Point I of petitioner's brief dismissed, on the ground that he had not reserved the right to appeal the denial of the speedy trial motion at the time he pleaded guilty, by obtaining both the government's and the court's consent to the taking of an appeal.

In its decision dated and entered April 19, 1982, the Court of Appeals acknowledged the rule in the Second Circuit permitting a defendant to enter a conditional guilty plea reserving his right to appeal from adverse pretrial rulings, but held that the rule was inapplicable to petitioner since he was required to obtain both the government's and the court's consent to taking the appeal conformably with the practice in the Second Circuit going back to *United States v. Doyle*, 348 F. 2d 715, *cert. denied*, 382 U.S. 843 (1965). Noting that a speedy trial deprivation is a nonjurisdictional defect, the court of appeals held that in light of the petitioner's failure to receive the government's and the district court's approval of an appeal, the defense had been waived as a point for appeal and had to be dismissed.[9] Without classifying

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9. The Second Circuit's disposition, based upon its opinion, should have been to dismiss the appeal from the district court's denial of the speedy trial motion and to otherwise affirm the judgment of conviction entered below. Instead, the judgment was affirmed *in toto*.

it as a nonjurisdictional defect, the court of appeals also held that the defense that the weapon petitioner admitted shipping is not a regulated "firearm" had been waived by petitioner's plea.

Following the court of appeals' affirmance and issuance of a mandate for petitioner's incarceration, petitioner brought a motion in the district court, pursuant to Fed. R. Crim. P. 35(b),[10] for reduction of the sentence. That motion is still pending. Simultaneously therewith, petitioner made application to Associate Justice Thurgood Marshall, pursuant to Supreme Court Rule 20.1, for an extension of time to file for a writ of certiorari so as to allow time for disposition of the Fed. R. Crim. P. 35(b) motion. By order of Mr. Justice Marshall dated May 26, 1982, the application was granted, extending petitioner's time to apply for the writ of certiorari to and including July 19, 1982.

The basis for federal jurisdiction in the district court is that the illegal manufacturing and dealing in firearms with which petitioner is accused are alleged to have occurred in interstate commerce and, therefore, are subject to federal regulation and prosecution under the Commerce Clause. The federal district court has federal question jurisdiction over criminalized acts which are proscribed and criminalized by federal law.

REASONS FOR GRANTING THE WRIT

This case presents for review two important questions of federal criminal procedure that have not been but should be decided by the Supreme Court, and as to which the federal courts are in conflict. The questions pertain to the effect upon an accused's appeal rights of a plea of guilty, and specifically whether

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10. Fed. R. Crim. 35(b) permits the district court to reduce a sentence after it has been imposed.

a conditional guilty plea, in which the accused reserves the right to appeal adverse pretrial rulings, constitutionally can be made subject to the requirement of obtaining the government's and the district court's consent to such plea. The second question is whether a guilty plea waives appellate review of the legal sufficiency of the charge to which the accused pleads. Point II of the Argument presents the question of the voluntariness of petitioner's plea.

I.

CONFLICT AMONG THE CIRCUITS WITH RESPECT TO GUILTY PLEAS

A. Constitutionality of Conditional Guilty Plea Procedure

A conditional guilty plea is a plea of guilty entered upon the condition that the defendant preserves the right to appeal prior rulings of the district court on an alleged defect in the prosecution that, if decided in defendant's favor, would prove dispositive of the case. *United States v. DePoli*, 628 F. 2d 779 (2d Cir. 1980); *United States v. Lace*, 669 F. 2d 46, 53 (2d Cir. January 5, 1982) (Newman J., concurring in result). The concept was fashioned in the Second Circuit by Judge Friendly, in his unanimous opinion in *United States v. Doyle, supra*, 348 F. 2d at 718-19, and thereafter received wide currency in the Second Circuit. *United States v. Mann*, 451 F. 2d 346 (1971); *United States v. Rothberg*, 480 F. 2d 534 (1973); *United States v. Burke*, 517 F. 2d 371 (1975); *United States v. Rico*, 594 F. 2d 320 (1979). The plea has also been adopted as a permissible pleading option in the District of Columbia and in the Third and Eighth Circuits, *Coleman v. Burnett*, 477 F. 2d 1187 (D.C. Cir. 1973); *United States v. Moscow*, 588 F. 2d 882 (3d Cir. 1978); *United States v. Clark*, 459 F. 2d 977 (8th Cir.), *cert. denied*, 429 U.S. 880, 34 L. Ed. 2d 135 (1972). The First Circuit has declined to rule on its acceptability. *United States v. Warwar*, 478 F. 2d 1183, 1185 n. 1 (1973).

As the Supreme Court noted in *Lefkowitz v. Newsome*, 420 U.S. 283, 289-90, 292-93, 43 L. Ed. 2d 196, 202, 204 (1975), the plea spares "the completely unnecessary waste of time and energy" of conducting a trial where the dispositive issues can be litigated through a full range of appellate review, thereby relieving congestion in criminal trial calendars. Complementing this advantage for the criminal justice system is the preservation of the benefits of and added flexibility afforded to plea bargaining, the defendant being able to tender a guilty plea in exchange for a reduced charge without having to forfeit appellate review of vindication of serious claims of illegality or unconstitutionality in apprehension and pretrial proceedings, as is the case with an unconditional guilty plea. *United States v. Moscow, supra*, 588 F. 2d at 887, Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564, 564-65, 580-81 (1980).

Six of the United States circuit courts appear to reject the concept of pleading guilty upon the condition of being able to appeal prosecutorial defects. The conditional guilty plea has been totally proscribed in the Fourth, Fifth and Ninth Circuits, *United States v. Matthews*, 472 F. 2d 1173 (4th Cir. 1973); *United States v. Benson*, 579 F. 2d 508 (9th Cir. 1978); *United States v. Sepe*, 486 F. 2d 1045 (5th Cir. 1973) (en banc) (per curiam).[11] The Sixth and Seventh Circuits, while condemning the practice, have felt

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11. The Fifth Circuit has equivocated on the issue. In *United States v. Caraway*, 474 F. 2d 25 (1973), *rehearing granted, id.* (en banc), *vacated as moot*, 483 F. 2d 215 (en banc) (per curiam), an appeal of denial of a suppression motion was heard on the merits despite defendant's plea of nolo contendere, the Fifth Circuit panel hearing the appeal pointing to an agreement between the defendant and the district court that the suppression ruling would be preserved for appeal. Sitting en banc, the Fifth Circuit vacated as moot the panel's opinion on the appealability of the suppression issue and on the suppression issue itself, which the panel decided in defendant's favor, resulting in the indictment's dismissal prior to rehearing en banc.

bound to honor it under the extenuating circumstances of its being incorporated into a plea bargain accepted by the court, *United States v. Cox*, 464 F. 2d 937 (6th Cir. 1972) and of the district court's having led defendants to believe they could appeal from a guilty plea, *United States v. Brown*, 499 F. 2d 829 (7th Cir. 1974). The Tenth Circuit, while indicating disfavor with the conditional plea, has not formally prohibited the practice. *Roeth v. United States*, 382 F. 2d 96 (1967), *cert. denied*, 390 U.S. 1016, 20 L. Ed. 2d 165 (1968); *United States v. Nooner*, 564 F. 2d 633 (1977), *rehearing denied, id.*

By statute in New York, it is an established practice in state criminal proceedings that a defendant who pleads guilty may nevertheless thereafter appeal an adverse ruling on a suppression motion based upon an unlawful search and seizure, a coerced confession or an improper pretrial identification. N.Y. Crim. Prac. L. §§710.20, 710.70 (subd. 2). The defendant is not required to obtain the government's or the court's consent to taking the appeal.

The United States Supreme Court, while praising the New York system as "commendable" in *Lefkowitz v. Newsome, supra*, 420 U.S. at 293, 43 L. Ed. 2d at 204, has yet to consider the issue of the acceptability of a conditional guilty plea and of the requirements for invoking it and availing himself of its benefits that can be imposed on the accused constitutionally without infringing his due process rights under the Fifth Amendment. The Supreme Court has held that even if the Constitution does not require the offering of a procedural option, nevertheless, once it is offered, the conditions for its invocation may not impermissibly burden or chill the exercise of constitutional rights and protections. *North Carolina v. Pearce*, 395 U.S. 711, 724-25, 23 L. Ed. 2d 656 (1969); *United States v. Jackson*, 390 U.S. 570, 581-82, 20 L. Ed. 2d 138 (1968); *see also*, Note, *Conditional Guilty Pleas, supra*, pp. 577-581.

In this case the Second Circuit held that petitioner was not entitled to appeal the district court's denial of his motion to dismiss for noncompliance with the Speedy Trial Act because he had not received the government's and the district court's approval of his appealing that ruling at the time of changing his plea to guilty. Such consent is required by the Second Circuit, and by the District of Columbia and Eighth Circuits, in order for a conditional guilty plea to be accepted. *United States v. Doyle, supra,* 348 F. 2d at 719; *United States v. Mann, supra; United States v. Rothberg, supra; Coleman v. Burnett, supra,* 477 F. 2d at 1195 (D.C. Cir.); *Jaben v. United States,* 333 F. 2d 535 (8th Cir. 1964), *aff'd,* 381 U.S. 214, 14 L. Ed. 2d 345 (1965), *explained in United States v. Doyle, supra,* 348 F. 2d at 719. While the Second Circuit has indicated that the necessary consents need not be expressly given but can be implied from the reticence of the prosecutor or the district court (*see United States v. Burke, supra,* 517 F. 2d at 379; *United States v. Rico, supra,* 594 F. 2d at 321, n. 1), in its opinion below the Second Circuit gave no consideration to the fact that at the hearing on his motion to vacate his plea both the District Court and the government did impliedly assent to petitioner's taking an appeal from his guilty plea, the District Court in granting petitioner's requests to enlarge his time to notice an appeal and to continue his bail, and the government in stating it had no objection to either action.[12]

In conflict with the decision below and with the D.C. and Eighth Circuits, the Third Circuit not only does not require the government's consent to a conditional guilty plea but even permits

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12. If the Second Circuit was relying on the chronological fact that these implicit consents were not obtained until after petitioner had changed his plea to guilty and been convicted and sentenced thereon, deeming the consents to be untimely, then its opinion raises for review the further question of whether the availability of a conditional guilty plea can be restricted as to the time when the accused must take the necessary steps to exercise the option.

the plea over the government's objection. *United States v. Moscow, supra.* This procedure recommends itself particularly inasmuch as it removes the constitutional objectionability of requiring the accused to obtain prosecutorial consent which, following successful negotiation of a favorable plea bargain, will hardly be forthcoming. There would be no reason at that point for the prosecutor to give his consent to an appeal. For him the trade-off for a light sentence is a sure sentence. Rather than surrender the benefit of the plea bargain for him, the prosecutor will withhold his consent, thereby putting the accused in the same position he would be in were the conditional plea not available: having to either accept the lenient sentence offered him and thus forego further assertion of his constitutional claims, or else proceed to trial and appeal knowing that he will face a heavier sentence if he loses. The burden or chilling effect on the assertion of constitutional claims is the same, whether the conditional plea is proscribed entirely or whether it is allowed subject to the government's and the court's consent. *See United States v. Doyle, supra,* 348 F. 2d at 719 n. 4.

The right to appeal from a criminal conviction has been described as "fundamental." *Nance v. United States,* 422 F. 2d 590, 592 (7th Cir. 1970). An appeal from the district court's judgment of conviction is a matter of right. *Coppedge v. United States,* 369 U.S. 438, 441, 8 L. Ed. 2d 21 (1962); *Rodriquez v. United States,* 395 U.S. 327, 329-30, 23 L. Ed. 2d 340, 344 (1969).

Because of the importance of the right of appellate review in federal criminal cases, and the potentially sizeable effect on that right and on plea negotiations and trial calendar conge of the conditional guilty plea, the Supreme Court should grant certiorari in this case to thoroughly review this concept for the first time and to unify the conflicting practices among the circuits as to the availability of the plea option and the manner in which and time when it can be exercised.

B. Waiver Effect of Guilty Plea on Defense of Legal Insufficiency

Under federal criminal procedure, a guilty plea constitutes a break in the chain of events, bringing the case to a close. Consistently with the expectation of finality, it is deemed to waive all prior nonjurisdictional defects in the prosecution, even those amounting to independent claims of deprivation of constitutional rights. *Blackledge v. Perry*, 417 U.S. 21, 29-30, 40 L. Ed. 2d 628 (1974); *Tollett v. Henderson*, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 243 (1973); *La Magna v. United States*, 646 F. 2d 775, 778 (2d Cir. 1981); *United States v. Cox, supra*, 464 F. 2d at 940 (6th Cir.); *Marteney v. United States*, 216 F. 2d 760, 762 (10th Cir. 1954).

By its own terms, however, this rule does not end the inquiry of whether the criminal prosecution is at an end or whether, on the other hand, the defendant may still take an appeal from his conviction entered on his plea. If the alleged defect relates to lack of jurisdiction, to the lack of power of the lower court to hale defendant before it, then the claim is not waived and may be raised on appeal. *Blackledge v. Perry, supra*, (double jeopardy claim); *Menna v. New York*, 923 U.S. 61, 46 L. Ed. 195 (same). The "fundamental premises for the conviction" remain appealable, *United States v. Doyle, supra*, 348 F. 2d at 718-19 (mentioning subject matter jurisdiction); *Roeth v. United States, supra*, 382 F. 2d at 98 (10th Cir. 1967).

Relying on *United States v. Mann, supra*, 415 F. 2d 346 (2d Cir. 1971) (per curiam) holding the Sixth Amendment speedy trial deprivation to be a nonjurisdictional defect, the Second Circuit below ruled that petitioner's claim of a Speedy Trial Act violation was nonjurisdictional and therefore was waived by his guilty plea. As to petitioner's argument in the District Court on his Rule 35(b) motion, and in the Court of Appeals in his brief, that the "M-16 lower receiver" petitioner admitted shipping was not a regulated

firearm or regulated component of a firearm, the Second Circuit held that this was a question of fact for the jury that the defendant waived by his plea.

The Second Circuit's opinion is further supported by the rationale such as appears in the *Menna* case, that a guilty plea is an admission of factual guilt, resolving all questions of fact and therefore obviating the need for a trial. *Menna v. New York*, 423 U.S. at 62, n. 2, 46 L. Ed. 2d at 197-98. As Mr. Justice White pointed out in his dissent in *Lefkowitz v. Newsome, supra*, 420 U.S. at 299, a guilty plea conclusively establishes the defendant's factual guilt; there are no factual questions remaining for which a trial is needed. *See United States v. Moscow, supra*, 588 F. 2d at 887.

On the other hand, as the Third Circuit observed in the same *Moscow* case, a guilty plea is an admission, often tacit, to the commission of the particular acts alleged to constitute the crime. *Id.*, 588 F. 2d at 888-89; *see also, North Carolina v. Alford*, 400 U.S. 25, 32, 27 L. Ed. 2d 162, 168 (1970). By the process of deductive reasoning, if the acts do not constitute a crime, it follows that there is no admission to the commission of a crime.

Thus, by the weight of authority, the rule in the circuits is that the defense of failure to charge an offense is not waived by a guilty plea, and the substantive sufficiency of the accusatory instrument remains subject to review on appeal. *Coleman v. Burnett, supra*, 477 F. 2d at 1195 (D.C. Cir.); *Kolaski v. United States*, 362 F. 2d 847, 848 (5th Cir. 1966); *United States v. Sepe, supra*, 474 F. 2d at 789 (5th Cir.); *United States v. Briscoe*, 428 F. 2d 954, 956 n. 2 (8th Cir. 1970), *cert. denied*, 400 U.S. 966, 27 L. Ed. 2d 386, *reh. denied*, 401 U.S. 926, 27 L. Ed. 2d 831 (1971). The failure of the accusatory instrument to state an offense

is deemed a fundamental defect that, by virtue of that fact, can be raised at any time, even in the face of a guilty plea.[13] *United States v. Pheaster,* 544 F. 2d 353, 361 (9th Cir. 1976).

Eschewing both a strict jurisdictional/nonjurisdictional dichotomy and the straightforward reasoning of the D.C., Fifth, Eighth, Ninth and Tenth Circuits, the First Circuit analyzed the appealability of a prosecutorial defect following a guilty plea on the basis of whether or not the defect is "directly related to the substantive matters that would have been presented at trial."

On that analysis, the court found in dictum that a claim of a speedy trial deprivation is not waived by a guilty plea, not involving the determination of the defendant's guilt or innocence by a trial that the defendant chooses to forego. *United States v. DeCosta,* 435 F. 2d 630, 632 (1970). On that analysis, the instanty claim that Count 6 of the indictment fails to allege shipment of a "firearm", going directly to the elements of the crime, was waived by his guilty plea. To that extent, the opinion of the Second Circuit below accords with the First Circuit's view. However, on the issue of the Speedy Trial Act defense's waiver, the two courts are in direct conflict.

The question of exactly what defenses or types of defenses to a federal criminal prosecution are waived as grounds for appeal by a guilty plea is important and should be decided by the Supreme Court. With the circuit courts presently holding conflicting views on the subject, at times expressing divergent views in the context of the same opinion, it seems impossible for an accused to know

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13. In the words of the Tenth Circuit, "[O]ne cannot plead guilty to an offense which is not affirmatively stated in the charge." *Marteney v. United States, supra,* 216 F. 2d at 760.

the consequences of a guilty plea on his appeal rights.[14] As petitioner brings out in Point II, *infra,* this confusion can jeopardize the voluntariness of guilty pleas which rests in good part upon the accused's having knowledge of the rights and defenses he is waiving. Certiorari should be granted to resolve the conflict between the decision of the Second Circuit below and the decisions of the D.C., Fifth, Eight, Ninth and Tenth Circuits as to whether a criminal charge's legal insufficiency is waived as a defense by a voluntary plea of guilty.

II.

THE SECOND CIRCUIT DEPARTED FROM THIS COURT'S STANDARDS FOR ASSESSING A GUILTY PLEA'S VOLUNTARINESS.

Point I of petitioner's argument for granting certiorari proceeds on the assumption that his guilty plea was voluntarily made. The District Court recited the allocution required by Fed. R. Crim. P. 11 [subds. (c), (d) and (f)] in order to ascertain whether there was a factual basis for the plea and to insure that petitioner was aware of the nature of the charge and of his constitutional rights to defend same. The Court of Appeals made no finding on the voluntariness issue, other than to note that petitioner's prior counsel obtained an advantageous plea bargain for his client and that his error on the Speedy Trial Act motion dates may have

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14. Judge Friendly's influental opinion in *Doyle*, 348 F. 2d at 718-19, can be read as supporting the result reached below in this case. Nevertheless, in the same opinion, Judge Friendly advances the opposite view in favor of the appealability of a failure-to-state-a-charge defense following an unconditional guilty plea, stating, at 348 F. 2d 718, "[F]ailure of the indictment to charge an offense may be treated as jurisdictional, . . . "

been harmless.[15] Petitioner raised in the Second Circuit the issue of competency of counsel as it affected the voluntariness and impact of his plea upon his appeal rights, both in his brief and in an answering affirmation opposing the respondent's motion to dismiss Point I of petitioner's brief. In a series of three cases commonly known as the Brady Trilogy [*Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747; *McMann v. Richardson*, 397 U.S., 759, 25 L. Ed. 2d 763; *Parker v. North Carolina*, 397 U.S. 790, 25 L. Ed. 2d 790 (1970)], the Supreme Court established that the proper standard for determining whether a waiver of post-conviction relief by a counseled plea of guilty is voluntarily and intelligently made and therefore that due process of law has been satisfied is whether the advice received from counsel is "within the range of competence required of attorneys representing defendants in criminal cases." *McMann v. Richardson, supra*, 397 U.S. at 771, 25 L. Ed. 2d at 773; *Tollet v. Henderson, supra*, 411 U.S. at 266, 36 L. Ed. 2d at 243; *see, McCarthy v. United States*, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 425 (1969). Because the Second Circuit decided the issue without regard to the applicable decisions of the Supreme Court, and because, under that standard, petitioner's plea was not voluntary, the Second Circuit's decision constitutes reversible error.

A plea of guilty to be deemed voluntary must be made intelligently and knowingly—an "intelligent relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S.

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15. Under the "farce and mockery" standard for gauging the denial of the Sixth Amendment right to the effective assistance of counsel, that the Second Circuit alone of all the federal circuits seems to follow, *Barnes v. Jones*, 665 F. 2d 427, 431 n. 4, 434 (2d Cir. Nov. 23, 1981), *cert. granted*, No. 81-1974 (U.S.L.W. 6/8/82), the result reached below may have been correct. But that is not the correct standard applicable to a determination of the effectiveness of a counseled guilty plea as a waiver of all otherwise appealable nonjurisdictional issues.

458, 464, 82 L. Ed. 1461, 1466 (1938). Since a guilty plea is the equivalent of a confession, it must be "an intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States, supra,* 397 U.S. at 748, 25 L. Ed. 2d at 756; *McMann v. Richardson, supra,* 397 U.S. at 766, 25 L. Ed. 2d at 771; *cf., Schneckloth v. Bustamante,* 412 U.S. 218, 36 L. Ed. 2d 854 (1973) (knowledge of the consequences is not prerequisite to the legitimacy of a car search since no constitutional rights to a fair trial are being waived).

To make an intelligent decision to plead guilty the accused must be informed and knowledgable as to the consequences of his plea. Note, *Conditional Guilty Pleas, supra,* pp. 564, 568 n. 19. Specifically, if a guilty plea is to have the effect of waiving the accused's right to appeal adverse rulings on procedural claims, the circuit courts have held that the defendant should be aware that appellate review of meritorious claims will be lost. *Coleman v. Burnett supra,* 477 F. 2d at 1195 (D.C. Cir.); *United States v. Caraway, supra,* 474 F. 2d at 28-29 (5th Cir.); *United States v. Benson, supra,* 579 F. 2d at 511 (9th Cir.). A few courts have intimated that it is necessary that the defendant had an idea of his chances on appeal. *United States v. Cox, supra,* 464 F. 2d at 943-44 (6th Cir.); *United States v. Sepe, supra,* 474 F. 2d at 789 (5th Cir.). This is to prevent the guilty plea from becoming a "trap for the unwary", *Lefkowitz v. Newsome, supra,* 420 U.S. at 293, 43 L. Ed. 2d at 204.

Counsel need not advise defendant correctly as to his chances on appeal, or fully as to the appeal procedure, but the advice he gives must be reasonably competent. *McMann v. Richardson, supra.* In *Strader v. Garrison,* 611 F. 2d 61 (4th Cir. 1979), defendant's counsel, by looking in the published regulations of the North Carolina Department of Corrections, could have determined the correct parole eligibility date. His telling defendant that the date was years sooner then it was, on which defendant

relied in agreeing to plead guilty, constituted "gross misadvice" and a denial of the Sixth Amendment right to effective assistance of counsel.

In *Bradbury v. Wainwright*, 658 F. 2d 1083, 1087 (1981), the Fifth Circuit noted:

> "Counsel must be familiar with the facts and the law in order to advise the defendant meaningfully of the options available . . . . This includes the responsibility of investigating potential defenses so that defendant can make an informed decision."

In the case at bar, petitioner's counsel obviously did not familiarize himself with either the facts or the law on the Speedy Trial Act violation. Had he looked at the docket sheet in the court clerk's office, he would have apprised himself within a few minutes of the correct dates of arrest and dismissal. Had he read the relevant statutes, he would have been in a position to correctly urge the correct timetables on the court.[16] Had he looked up the statutory definition of firearm, which is found in the same chapter of Title 26 as that containing the prohibition of an unregistered firearm's shipment, he would have been in a position to advise his client that there was a fair argument to be made that the count did not state an offense. He could then have advised petitioner that, if he did plead to the count, then he should enter a conditional plea conditioned upon reservation of the right to appeal the

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16. Counsel's affirmation in support of petitioner's motion to dismiss was wrong on every other point of law urged with respect to prosecutorial time limits; *viz.*, that the government had 10 days after arraignment to bring an indictment (no such time limitation existed) and the government had to be prepared for trial within six months of arrest [the correct time limit under the Speedy Trial Act was 100 days, *see* 26 U.S.C. §§3161(b), 3161(c)(1)].

insufficiency of the count and the . . .al of the Speedy Trial Act motion.[17]

These shortcomings are a far cry from a lawyer's failure to anticipate changes in the law such as were involved in the *Brady* trilogy and in *Tollet,* which the Supreme Court found not to fall short of the *McMann* standard. But where counsel is unaware of present controlling law and procedure, is ignorant of critical, basic and controlling information and, moreover, fails to take any steps to reargue the defendant's defenses after being notified of the correct information by the government, then he has acted beneath the applicable standard of reasonable competence and his client's plea may not stand. Had the Second Circuit applied the applicable standard, it would have had to reverse petitioner's conviction as being predicated on an involuntary and unintelligent plea made without competent advice of counsel.

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17. Petitioner disagrees with the Second Circuit's suggestion that the result the district court reached, using petitioner's counsel's dates, was correct. Given the questionability of the argument that the prohibitions of the Speedy Trial Act against untimely prosecutions and against reprosecution for the same charge once its initial untimely prosecution has been dismissed are rendered inoperative where the government and not the accused moves to dismiss the initial prosecution, and even were that argument ultimately sustained, reasonably competent counsel would have moved to dismiss the second prosecution, on the basis of the correct Speedy Trial Act dates. The argument for a Speedy Trial Act violation calling for the reprosecution's dismissal, at least as to Count 6, was substantial enough that a reasonably competent criminal lawyer would have urged it and would have counseled the petitioner to preserve it and the failure-to-state-an-offense issue for appeal by taking a conditional guilty plea. Judging from the subsequent history of the case, it is not at all certain that the government would not have consented, for when substituted counsel on October 5th asked for substantial concessions of extension of time and continuation of bail so as to appeal these issues, the government did not hesitate to state it had no opposition to these efforts to take an appeal.

Because the Second Circuit decided the voluntariness issue in a way in conflict with the appiicable decisions of the Supreme Court, certiorari should be granted to review the decision. In granting certiorari recently in *Jones v. Barnes, supra,* 50 U.S.L.W. 3963 (June 7, 1982), in which federal habeas corpus relief from a state conviction after trial was granted because of the inadequacies of appellate counsel in not urging points for reversal of the conviction suggested by the defendant, the Supreme Court has indicated that the effectiveness of a criminal lawyer's representation is an important and timely federal question that is ripe for review. The instant case raises the same question and, therefore, it should be reviewed by the Court in order to arrive at a thorough disposition of the issue.

CONCLUSION

The petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, N.Y.
July 14, 1982

Respectfully submitted,

CHARLES A. GIULINI, JR.
Attorney for Petitioner

MICHAEL JOSEPH J. BARNAS
Of Counsel

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

81-1357

FILED APRIL 19, 1982
A. Daniel Fusaro, Clerk

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of April, one thousand nine hundred and eighty-two.

Present:

Hon. J. Edward Lumbard,
Hon. James L. Oakes,
Circuit Judges.
Hon. Daniel M. Friedman,
Chief Judge, Court of Claims.*

United States of America,

Appellee,

v.

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* Sitting by designation.

Opinion of the Court of Appeals for the Second Circuit

Ralph Frederick Nunziata,

Appellant.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Ralph Nunziata appeals from a judgment of conviction and a sentence entered in the United States District Court for the Eastern District of New York, Henry Bramwell, Judge, following his plea of guilty to Count Six of a fifteen-count indictment. Count Six charged appellant with transporting an unregistered firearm, "to wit: a M-16 lower receiver," in interstate commerce in violation of 26 U.S.C. §§5261(j), 5871; 18 U.S.C. §2. After the court sentenced appellant to six years' imprisonment, appellant moved to withdraw his guilty plea and to renew a previously denied speedy-trial motion. On this appeal appellant challenges his sentence and the denial of his motion. We dismiss the appeal from the denial of appellant's speedy-trial motion and affirm the sentence and the denial of appellant's motion to withdraw his plea.

The appeal from the denial of appellant's speedy-trial motion must be dismissed because by pleading guilty he waived his right to appeal. "A plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects." *United States v. Burke*, 517 F.2d 377, 379 (2d Cir. 1975) (quoting *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965)). A speedy-trial deprivation, whether statutory or constitutional, is a nonjurisdictional defect. *See United States v. Doyle*, 348 F.2d at 719. *See also United States v. Mann*, 451 F.2d 346 (2d Cir. 1971) (per curiam).

Opinion of the Court of Appeals for the Second Circuit

The Second Circuit has provided defendants with some leeway by allowing trial courts to accept conditional guilty pleas. *See generally* Note, *Conditional Guilty Pleas,* 93 Harv. L. Rev. 564 (1980). In this court, as in the District of Columbia and Eighth Circuits, a plea is conditional and thereby preserves the defendant's right to appeal only if the defendant has secured the consent of the court and the Government. *See United States v. DePoli,* 628 F.2d 779, 781 & n.1 (2d Cir. 1980) (noting that in the Third Circuit the Government's consent is not required; in the Fourth, Fifth, Sixth, and Ninth Circuits conditional pleas are not permitted; and in the other circuits the law is uncertain). *See also United States v. Price,* 599 F.2d 494, 496 n.1 (2d Cir. 1979); *United States v. Rothberg,* 480 F.2d 534 (2d Cir.), *cert. denied,* 414 U.S. 856 (1973).

In the absence of court and Government approval, a plea is not conditional and operates as a waiver of nonjurisdictional defects. *See United States v. Mann,* 451 F.2d at 347 ("neither the trial judge nor the prosecutor gave any consent whatever"). It is true that this court has occasionally departed from the strict rule stated in *Mann* that "[t]he consents . . . be clearly stated in writing or on the trial record." *Id. See, e.g., United States v. Rico,* 594 F.2d 320, 321 n.1 (2d Cir. 1979) (Government agreed and court "did not object, but expressed no view"; held plea was conditional); *United States v. Burke,* 517 F.2d at 379 (court approved reservation and prosecutor said nothing; held this was implicit assent so plea was conditional). In those cases, however, the defendants expressly reserved their right to appeal from a particular ruling and the question was the effect of the prosecutor's or court's conduct.

In the instant case, by contrast, appellant pleaded guilty immediately following the denial of his speedy-trial motion, but without ever raising the possibility of an appeal from that denial. In the absence of even an attempt to condition his plea on a

reservation of his right to appeal, much less a receipt of court and Government approval of such a strategy, appellant waived his right to appeal. *United States v. Reincke,* 383 F.2d 129, 131-32 (2d Cir. 1967), on which appellant relies, is inapposite. In *Reincke* the defendant successfully claimed he had been denied effective assistance of counsel because his counsel had failed to move to set aside the jury's verdict or to perfect an appeal, even though counsel knew an appeal was meritorious (the evidence against the defendant was insufficient), and the defendant had asked him to appeal. This is far different from the situation here. Nunziata's counsel did err regarding the dates relevant to the speedy-trial motion,* but he also obtained an advantageous plea bargain for his client, whose principal complaint is with the unexpected severity of his sentence.

Appellant's contention that the court below abused its discretion in denying his motion to withdraw his plea is without merit. During his allocution appellant admitted to transporting "the rear half of a demilitarized M-16 Receiver, or a part of it." He also admitted in general terms to doing the acts charged in Count Six, and agreed with the Government's summary of its case. At the time of sentencing appellant reaffirmed his guilt, both personally and through his attorney. In short, there was a factual basis for the plea even if the above-quoted language constituted a variance from the language of the indictment, and the court's refusal to permit withdrawal of the plea, after sentence

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* Although we do not reach the merits, we note that it is far from clear that counsel's error caused the court to reach an erroneous result. *See, e.g., United States v. Simonetti,* No. 81-00342 (S.D.N.Y. Aug. 21, 1981) (a defendant's remedy for failure to indict within thirty days was to seek dismissal of the complaint; having failed to do so before the complaint was dismissed without prejudice, further sanctions were held unavailable).

had been imposed, was not an abuse of discretion. Appellant's claim that a jury should have an opportunity to decide whether the weapon he described is a firearm is also without merit, because this defense was waived by the plea. *See LaMagna v. United States,* 646 F.2d 775 (2d Cir. 1981).

Appellant also contends that the sentence was excessive, in abuse of the court's discretion and in violation of the Eighth Amendment. This point borders on the frivolous. While the six-year sentence clearly exceeded what the defendant had hoped for, it was within the statute's ten-year limitation. Moreover, the court did not rely on improper factors or incorrect information in imposing sentence. Accordingly, the sentence is not subject to appellate review. *See United States v. Tucker,* 404 U.S. 443 (1972); *United States v. Hutcher,* 622 F.2d 1083, 1089 (2d Cir.), *cert. denied,* 449 U.S. 875 (1980).

Judgment affirmed.

s/ J. Edward Lumbard
s/ James L. Oakes
Circuit Judges

s/ Daniel M. Friedman
Chief Judge,
Court of Claims.

OPINIONS OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CR-298

UNITED STATES OF AMERICA

- against -

RALPH F. NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

June 23, 1981
2:00 P.M.

B E F O R E :

THE HONORABLE HENRY BRAMWELL, U.S.D.J.

COURT CLERK: United States against Ralph Nunziata.

THE COURT: The first thing I will do on this pending motion to dismiss the Indictment for failure to prosecute and, following the requirements of the Speedy Trial Act and timetable, I will put on the record a disposition of that motion.

The defendant Ralph Nunziata has moved, pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure, to dismiss the

within Indictment for failure to comply with the Speedy Trial Act, 18 USC, Section 3161.

This motion was originally scheduled to be heard on Friday, June 26th, but, upon the request of the parties, I will render my decision today.

Mr. Nunziata was first arrested on a complaint on August 1, 1980. The Government, thereafter, dismissed that complaint on September 1, 1980.

Mr. Nunziata was later indicted on May 14, 1981, and arraigned on May 22, 1981.

It is the defendant's position that he was the subject of Government investigation for many months prior to his arrest in August of 1980, and that the Government had ample opportunity to bring an indictment within six months of his arrest.

Section 3161 D(1) of Title 18 provides in pertinent part:

If any charge contained in the complaint filed against an individual is dismissed, or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense, or offense based on the same conduct or arising from the same criminal episode, the provisions of Subsections B and C of this Section shall be applicable with respect to such subsequent complaint, indictment, or information.

Section 3161(b) of the Speedy Trial Act provides:

Any information or indictment charging and individual with the commission of an offense shall be filed within thirty days

from the date on which such individual is arrested or served with a summons.

Section 3161(c)(1) also mandates that a trial be commenced within seventy days of the filing of the indictment.

With this statutory background in mind, I would now turn to Mr. Nunziata's motion. The defendant was arrested on August 1, 1980, after which the Government had thirty days to obtain an indictment. Instead of doing so, they dismissed the complaint on September 1st, thus satisfying the thirty-day requirement of Section 3161(b).

Once the complaint was dismissed, the provisions of the Speedy Trial Act were told, because no charges were pending against the defendant.

As the Second Circuit noted in *United States v. Hillgas,* at 578 F.2d 453, the Speedy Trial Act was not intended to impose time limits in addition to those provided for by the Constitution with respect to Government investigations undertaken while the defendant is now the subject of normal proceedings.

In the instant case, therefore, Mr. Nunziata's contention that the Government took too long in its investigation of him is without merit.

In this connection, the defendant's reliance on *United States v. Taylor* is misplaced, since that case addressed the question of timely arraignment and no question has been raised concerning Mr. Nunziata's arraignment on this motion.

Accordingly, the defendant's motion to dismiss for failure to comply with the Speedy Trial Act is denied.

It is so ordered.

Opinions of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 CR 00298

UNITED STATES OF AMERICA

Plaintiff,

- against -

RALPH FREDERICK NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

October 5, 1981
9:30 A.M. o' clock

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: Mr. Giulini, I've considered the motion, the papers. I'll put my position on the record.

The defendant Ralph Nunziata moves this Court this morning for an order permitting him to reargue a speedy trial motion which was denied by this Court on June 23rd, 1981. In the decision I rendered from the bench: After review of the defendant supporting affidavit, memorandum of law, after hearing counsel

this morning, I am constrained to deny the motion once again for the reasons I set forth in my decision of June 23rd, 1981.

In addition, I also note the defendant failed to raise a timely objection to the previous speedy trial determination.

Opinions of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 CR 00298

UNITED STATES OF AMERICA

Plaintiff

- against -

RALPH FREDERICK NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

October 5, 1981
9:30 A.M. o'clock

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: I'll put the Court's position on the record.

Defendant Ralph Nunziata has also moved this Court for an order permitting him to withdraw his plea and judgment of conviction pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure. The Rule provides that after sentence on the judgment of conviction a defendant may be permitted to withdraw his plea

of guilty if he can demonstrate to the satisfaction of the Court that the failure to do so will result in manifest injustice. The most recent controlling case in this Circuit interpreting the post-sentence aspect of Rule 32(d) is United States against Tiller, 602 Fed. 2d 30. The case instructs us that a defendant in Mr. Nunziata's position must shoulder a considerable burden in demonstrating that his plea, conviction and sentence meet the manifest injustice standard enunciated by the Rule. There is also some indication in Tiller that this burden entails an assertion of defendant's innocence to the satisfaction of the Court, but this requirement is not in this Court's view an absolute prerequisite to withdrawal of the plea providing defendant can show facts and circumstances warranting a favorable exercise of the Court's discretion under the Rule.

Mr. Nunziata, in his application to this Court, relies quite heavily on an alleged variance in the substance of Count Six of the indictment and that to which he plead guilty in full satisfaction of the charges against him on June 23rd, 1981. More specifically, he points to Count Six which charges the unauthorized shipment in interstate commerce of, and I quote "An M-16 lower receiver." And his admission before this Court on June 23rd, 1981 that he shipped, and again I quote, "The rear half of a demilitarized M-16 receiver as being fatally inconsistent with each other.

Moreover, he asserts that the unlawful character of his conduct did not become apparent to him until after June 20, 1979 at such time as the Bureau of Alcohol, Tobacco and Firearms advised him of the status of the instrument under the National Firearms Act.

I can agree with neither of these contentions. Mr. Nunziata during the lengthy colloquy with this Court on June 23rd, 1981

was repeatedly advised in the clearest terms of the nature and consequences of his guilty plea. The record reveals not only did he admit his guilt in the clearest terms, but was given every conceivable opportunity to refute or modify the Government's description of the proof it would have offered at Mr. Nunziata's trial. He not only failed to object to the Government's proposed proof, but specifically affirmed it as being an accurate representation of what had happened.

Under these circumstances, this Court cannot and will not reopen the conviction and sentence. Even under the more lenient interpretation of the manifest injustice standard of Rule 32(d) suggested in United States against Tiller, Mr. Nunziata has failed to demonstrate anything at all which would warrant this Court in setting aside a plea entered into intelligently, knowingly and voluntarily during a solemn plea colloquy, during which the defendant was advised in the clearest terms of the consequences of his plea. Even were this Court to find that a variance exited between Count Six of the indictment and the charge which Mr. Nunziata pleaded, I would be constrained to deny Mr. Nunziata's motions for the reasons I have mentioned.

Accordingly, defendant's motion to set aside his conviction and sentence is denied in all respects. The defendant is ordered to surrender to the United States Marshal on the first floor of this building at 12:00 noon today.

JUDGMENT OF CONVICTION AND SENTENCE SPREAD ON THE RECORD

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CR-298

UNITED STATES OF AMERICA

- against -

RALPH F. NUNZIATA,

Defendant.

United States Courthouse
Brooklyn, New York

June 23, 1981
2:00 P.M.

B E F O R E :

THE HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: Having been advised of your constitutional rights, the nature of the charge against you and the consequences of your plea, how do you plead to Count 6 of the Indictment?

THE DEFENDANT: Guilty.

THE COURT: The Court finds there is a factual basis for the plea, and accepts the guilty plea to Count 6.

Judgment of Conviction and Sentence Spread on the Record

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CR-298

(HB)

UNITED STATES OF AMERICA

- against -

RALPH FREDERICK NUNZIATA,

Defendant.

United States Courthouse
223 Cadman Plaza East
Brooklyn, New York

September 11, 1981
10 o'clock a.m.

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

THE COURT: The Court has taken into consideration the fact that this defendant pleaded guilty.

The defendant was arrested by agents for unlawfully engaging in the business of manufacturing and dealing in fire-arms and ammunition over two and a half years.

Judgment of Conviction and Sentence Spread on the Record

He was allowed to plead to one of 15 counts. The defendant admits his guilt, but limits his involvement to the count to which he pleaded.

The defendant has been unemployed since March of 1980. Prior to that date, he had attended college for two and a half years.

His past work history shows five job changes in the seven year period. It seems apparent that the defendant was involved in illegal fire-arms activity for at least two and a half years.

The defendant received probation after conviction for possession of a weapon about seven years ago in the Supreme Court, Queens County.

It is adjudicated that the defendant is hereby committed to the custody of the Attorney General or his authoritied representative, for imprisonment for a period of six years.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., amend. V (in part):

> "No person shall be * * * deprived of life, liberty, or property, without due process of law, * * * *"

U.S. Const., amend. VI (in part):

> "In all criminal prosecutions the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Statutes Involved

18 U.S.C. §2:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 U.S.C. §921(a)(3):

> "(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile

by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

18 U.S.C. §922(g)(1):

"It shall be unlawful for any person '(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;. . . .

* * *

to ship or transport any firearm or ammunition in interstate or foreign commerce."

18 U.S.C. §924(a):

"Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisonment not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

Constitutional Provisions and Statutes Involved

18 U.S.C. §3161(b):

"Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charge. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days."

18 U.S.C. §3161(c)(1):

"In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent."

18 U.S.C. §3161(d)(1):

"If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual

is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be."

18 U.S.C. §3162(a)(1):

"If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."

Constitutional Provisions and Statutes Involved

18 U.S.C. §5841:

"(a) The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, or transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request."

26 U.S.C. §5845(a)(6):

"For the purpose of this chapter—

(a) Firearm — the term 'firearm' means . . . (6) a machine gun;. . . ."

26 U.S.C. §5845(b):

"The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

Constitutional Provisions and Statutes Involved

18 U.S.C. §5861(j):

"It shall be unlawful for any person —

(j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter;. . . ."

18 U.S.C. §5871:

"Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000.00, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine."

Rules

Fed. R. Crim. P. 11(c):

"Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding

against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

Fed. R. Crim. P. 11(d):

"The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions

between the attorney for the government and the defendant or his attorney."

Fed. R. Crim. P. 11(f):

"Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

Fed. R. Crim. P. 32(d):

"A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Fed. R. Crim P. 35(b):

"The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

Office - Supreme Court, U.S.
FILED
SEP [redacted]
ALEXANDER L. STEVAS,
CLERK

No. 82-117

In the Supreme Court of the United States

OCTOBER TERM, 1982

RALPH FREDERICK NUNZIATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

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Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner waived his right to appeal non-jurisdictional errors by failing to state his intention to enter a plea of guilty conditioned on being able to appeal.

2. Whether the court of appeals correctly held that petitioner's claims of error were non-jurisdictional and therefore waived by his guilty plea.

3. Whether petitioner's guilty plea was knowing and voluntary.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-117

RALPH FREDERICK NUNZIATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported. The opinions of the district court (Pet. App. 6a-8a, 9a-10a and 11a-13a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1982. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 19, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 23, 1981, petitioner pleaded guilty in the United States District Court for the Eastern District of New York to one count in a 15-count indictment, which alleged transportation of an unregistered firearm in interstate

commerce in violation of 26 U.S.C. 5861(j), 5871 and 18 U.S.C. 2. He was sentenced to six years' imprisonment. The court of appeals affirmed (Pet. App. 1a-5a, 12a-13a).

On August 12, 1980, petitioner was arrested on a complaint charging him with illegally transporting a firearm (a partly assembled M-16 rifle) in interstate commerce, in violation of 18 U.S.C. 922(g)(1).[1] On September 18, 1980, on the government's motion, the complaint was dismissed (C.A. App. 7a). Petitioner did not, however, seek, either before or after the government's motion, to have the complaint dismissed with prejudice.[2]

On May 14, 1981, petitioner was indicted in a fifteen-count indictment returned in the United States District Court for the Eastern District of New York, charging him with various firearms violations (Pet. App. 7a; C.A. App. 8a-13a). Counts 5 and 6 of the indictment referred to the same firearm that was the subject of the earlier complaint. The indictment alleged, however, that petitioner violated a different statute, 26 U.S.C. 5861(d) and (j), which prohibits possession and transportation of an unregistered firearm.

Petitioner moved to dismiss the indictment as barred by the Speedy Trial Act of 1974, 18 U.S.C. 3152 *et seq.* He did not challenge the government's failure to act within 30 days

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[1]Section 922(g)(1) makes it unlawful for anyone who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport a firearm in interstate commerce. Petitioner had previously been convicted of a felony in the State of New York (C.A. App. 5a) ("C.A. App." refers to the appendix in the court of appeals).

[2]Under the Speedy Trial Act of 1974, an information or indictment must be filed within thirty days after an individual is arrested. 18 U.S.C. 3161(b). The Act provides for dismissal of the complaint for violation of this time limit, but, by its own terms, dismissal may be without prejudice. 18 U.S.C. 3162.

after his arrest,[3] but rather claimed that the government had delayed unreasonably in waiting more than a year before bringing the indictment (C.A. App. 15a-16a). The district court denied the motion (Pet. App. 6a-8a). Petitioner then entered a plea of guilty to Count 6 of the indictment—transportation of an unregistered firearm—which the district court accepted after a full hearing in accordance with Fed. R. Crim. P. 11 (Pet. App. 14a).

Petitioner subsequently moved pursuant to Fed. R. Crim. P. 32(d) to withdraw his guilty plea, arguing for the first time that there was a variance between the charge in the indictment and his admissions in pleading guilty at the Rule 11 hearing (C.A. App. 60a-61a). Specifically, he claimed that the indictment charged him with transporting an unregistered firearm, namely an "M-16 receiver," but that he admitted to shipping "the rear half of a demilitarized M-16 receiver, or a part of it" (*id.* at 61a). Petitioner asserted that the partly assembled M-16 was not a "firearm" within the meaning of the statute. Petitioner also renewed his previously denied speedy trial motion, claiming that the original decision was based on erroneous dates (*id.* at 63a-64a).

The district court denied petitioner's motion to withdraw his guilty plea, finding that he had "admit[ted] his guilt in the clearest terms" and had failed to show that his plea was

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[3]In petitioner's motion to dismiss the indictment, his counsel used incorrect dates for petitioner's arrest and the dismissal of the complaint, using August 1, 1980 as the date of arrest instead of August 12, and September 1, 1980, for the dismissal instead of September 18. When the court denied the motion, it relied on the correct date of arrest, having been informed by the government of that error, but on the incorrect date of dismissal. The court thus incorrectly concluded that the dismissal had been within the thirty-day time limit (Pet. App. 8a). On the following day, however, the government notified the court of the correct date of dismissal of the complaint, and a copy of that letter was sent to petitioner (C.A. App. 7a, 33a).

not intelligently, knowingly and voluntarily made (Pet. App. 11a-13a). The court also denied the speedy trial motion for the reasons stated in its previous order and because petitioner's objection to that order was untimely (*id.* at 9a-10a).

2. The court of appeals dismissed petitioner's appeal from the denial of his speedy trial motion, finding that he waived his right to appeal by pleading guilty without making any attempt to condition his plea on a reservation of his right to appeal (Pet. App. 2a-4a).[4] The court of appeals affirmed the denial of petitioner's motion to withdraw his guilty plea, finding that there was an adequate factual basis for the plea and that petitioner, by pleading guilty, had waived his right to have a jury determine the factual issue of whether the weapon was a "firearm" within the meaning of the statute (*id.* at 4a-5a).

ARGUMENT

1. Petitioner first contends (Pet. 9-13) that the courts of appeals follow conflicting practices with regard to conditional guilty pleas, and that the Second Circuit's requirement of consent by the government and district court is in conflict with other circuits. Even accepting petitioner's observation that the availability of a conditional guilty plea, in which a defendant reserves the right to appeal certain legal issues while pleading guilty, varies in the different circuits, it is clear that no court of appeals would have allowed petitioner to appeal, because he made absolutely no attempt to condition his guilty plea on a right to appeal. See *United States* v. *DePoli*, 628 F. 2d 779, 781 n.1 (2d Cir.

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[4]The court noted that even if petitioner had preserved his speedy trial objection, it was "far from clear" that he would have prevailed because he had failed to request that the complaint against him be dismissed with prejudice prior to the time the government moved to dismiss without prejudice (Pet. App. 4a n.*).

1980). Petitioner has cited no case allowing appeal from a guilty plea where the defendant has failed to reserve his right expressly. See *United States* v. *Moskow*, 588 F. 2d 882, 884 (3d Cir. 1978). Thus, this case presents no occasion to review the practices in the courts of appeals regarding conditional guilty pleas.

2. Petitioner argues (Pet. 14-17) that the court of appeals erred in holding that his claims on appeal were non-jurisdictional and therefore waived by his guilty plea. He contends that both his speedy trial claim and his claim that the partly assembled M-16 rifle was not a firearm were jurisdictional defects and thus were reviewable after a guilty plea.

The law is clear that a guilty plea conclusively establishes the defendant's factual guilt, and accordingly waives all defects in the prosecution, even constitutional claims, except those relating to lack of jurisdiction, *i.e.*, the power of the court to hale a defendant before it. *Menna* v. *New York*, 423 U.S. 61, 62 (1975); *Blackledge* v. *Perry*, 417 U.S. 21, 29-31 (1974); *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Applying these principles, the court of appeals correctly found (Pet. App. 2a) that a claim of a statutory speedy trial violation, which requires dismissal only in the discretion of the court, is not a jurisdictional defect. See *United States* v. *Mann*, 451 F. 2d 346, 347 (2d Cir. 1971); cf. *United States* v. *Doyle*, 348 F. 2d 715, 719 (2d Cir.), cert. denied, 382 U.S. 843 (1965).[5]

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[5]Petitioner claims that the decision below on this issue conflicts with that of the First Circuit in *United States* v. *DeCosta*, 435 F. 2d 630, 632 (1970). In fact, however, the court in that case made no ruling on the question whether a constitutional speedy trial claim is waived by a plea of guilty, declaring on the merits that there had been no speedy trial violation. *DeCosta* is similar to this case in this regard since it is unlikely that petitioner would have prevailed on the merits of his statutory speedy trial claim, even if it had not been barred. See note 4, *supra*.

With respect to the claim that the item petitioner admitted shipping was not a firearm, the question whether the M-16 receiver, or part of it, was included within the statute's prohibition is an issue of fact that would have properly been resolved at trial.[6] *LaMagna* v. *United States*, 646 F. 2d 775, 777-778 (2d Cir. 1981), cert. denied, 454 U.S. 898 (1981); see also *United States* v. *Benson*, 579 F. 2d 508, 509 (9th Cir. 1978). By pleading guilty and unequivocally admitting that he had committed the acts charged in Count 6 of the indictment (C.A. App. 25a), however, petitioner finally resolved this factual issue just as if a jury had rendered a guilty verdict. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).[7] Accordingly, the issue was not appealable after the guilty plea.

3. Finally, petitioner contends (Pet. 17-22) that his guilty plea was not voluntarily made because he did not receive competent advice from his counsel. Specifically, petitioner argues that his counsel's error in specifying the dates relating to his speedy trial claim, the subsequent failure to renew the claim once he had been advised of the proper dates, and

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[6]The definitional section of the statute includes in the definition of "firearm" a machinegun (26 U.S.C. 5845(a)(6)). "Machinegun" includes "the frame or receiver of any such weapon." 26 U.S.C. 5845(b). Thus, the part of an M-16 listed in the indictment would seem to fit the definition. Whether it did, of course, would have been an issue for the jury, but for petitioner's guilty plea.

[7]Petitioner claims (Pet. 15-16) that the decision in this case conflicts with a number of other cases in which the courts have held that the failure of an indictment to allege an offense is a jurisdictional defect that may be raised at any time, even after a guilty plea. Petitioner's quarrel is not, however, with the legal sufficiency of the indictment itself, which plainly alleges all the elements of an offense under the statute charged (C.A. App. 10a). Rather, his argument concerns the nature and sufficiency of the proof that the government would have been required to adduce at trial to establish guilt on the charge as alleged in the indictment.

the failure to advise petitioner that he could argue that the partly assembled M-16 part was not a "firearm," amounted in combination to incompetent advice of counsel that negated the intelligent and knowing character of his guilty plea. See *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970). Petitioner's fact-bound claim is without merit.

In *McMann* v. *Richardson, supra*, 397 U.S. at 770-771, this Court rejected the notion that the adequacy of counsel in regard to a guilty plea depends on a retrospective assessment of whether the attorney's legal judgment was "right or wrong." What matters is whether petitioner's interests have been faithfully represented, *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), and the court of appeals expressly found (Pet. App. 4a) that counsel had negotiated "an advantageous plea bargain," which was not undermined by the failure to make a dubious speedy trial argument or to discuss with petitioner the remote possibility that one count in a 15-count indictment might be rejected by a jury because of the nature of the firearm at issue. As the court of appeals found, petitioner's complaint is not with the adequacy of the representation of his attorney but rather "with the unexpected severity of his sentence" (*id.* at 4a). Accordingly, the adequacy of petitioner's representation at the time of his guilty plea raises no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

SEPTEMBER 1982

DOJ-1982-09